authorized to order anything which would make the business unremunerative, and that it would be difficult to secure the desired result by general legislation. The question has been discussed above as if it referred merely to the pursuit of ordinary trades or professions, but apparently ordinary methods of public demonstration and perhaps even ordinary recreations are similarly protected. See *Matter of Frazee*, *supra*; *Chicago* v. *Trotter*, *supra*; *State* v. *Yopp*, *supra*.

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RIGHT OF TENANT TO REMOVE FIXTURES AFTER A NEW LEASE. — It is refreshing to find a restriction placed on the harsh doctrine that a tenant by accepting a lease for a new term without making an express reservation loses his right of removing fixtures. Ever since this doctrine was established by the case of *Loughran* v. *Ross*, 45 N. Y. 792, the New York courts have been trying to draw back from the unfortunate position then adopted. The principle of that case has received a decided limitation in a recent decision of the appellate division of the Supreme Court. *Bernheimer* v. *Adams*, 70 N. Y. App. Div. 114. The plaintiff foreclosed his mortgage on the lease and certain fixtures consisting of water-closets, partitions, etc., owned by a tenant. The latter's wife bought the property at the sale, took from the landlord a new lease for the unexpired term similar to the former one except that it ran to her as lessee, and remortgaged the fixtures and her new lease to the plaintiff in lieu of paying him the purchase price. This second mortgage was foreclosed and bought in by the plaintiff who subsequently replevied the fixtures. The court held that the right to remove the fixtures was not lost by the failure of plaintiff's mortgagor to reserve it upon surrendering the old lease.

The court evidently feeling the need of "cumulative" reasons for a decision so much at variance with the early New York doctrine, lays stress on the facts that the lessee was not the original tenant; that the lease was not for an additional term; and that the fixtures were not "distinctively realty." It is submitted that none of these considerations should affect the decision. That the lessee is a new tenant makes if anything a stronger case for the landlord, as it is conceivable that an assignee, taking a new lease in his own name, might not care to preserve the fixtures as such. Furthermore, it is less harsh to deny the right of removal to an assignee than to the original tenant. Nor does the fact that this was a change of tenancy for an unexpired term seem of great weight; for, after all, it was a new holding under a new lease without any reservation, the very crux of the question. It seems that one rule may be applied equally well to the case of a new tenant for the same term, and that of the same tenant for a new term, as both situations result from the surrender of an original tenancy. It might be argued that as the original tenant's right to remove fixtures continues at least until the end of the term, so his successor's also should exist up to that time. To this the reply is that it is a personal right, passing only by assignment, and has not in fact been assigned. The basis of the court's third distinction, that the fixtures in this case were not distinctively realty, is one somewhat favored in New York but of no standing elsewhere. *Smusch* v. *Kohn*, 22 N. Y. Misc. 344. One can hardly see how this distinction affects the point in issue. It probably is of value in determining whether a given chattel becomes a fixture or not; but granting it a fixture, the

consideration of its essential nature should have no bearing upon whether or not the right of removal survives.

The true foundation of this decision must be sought in the underlying justice of the case and not in the reasoning of the court. Of course the plaintiff's mortgagor never intended to give the fixtures to her landlord, and it would seldom occur to a lay mind that the taking of a new lease could have such a result. The obvious hardship of a rule which makes the lessee take out the fixtures and replace them at the beginning of each new term should be a sufficient reason for the decision in the principal case. Two jurisdictions at least have adopted this more lenient view, *Kerr* v. *Kingsbury*, 39 Mich. 150; *Second Nat. Bank* v. *Merrill*, 34 N. W. Rep. 514 (Wis.); although the weight of authority, it must be admitted, is strongly opposed. See *Watriss* v. *First Bank of Cambridge*, 124 Mass. 571. On grounds of obvious justice to the lessee it is to be hoped that the principal case will have some effect toward changing the present harsh rules on this subject.

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EFFECT OF STATUTES FOR SURVIVAL OF ACTIONS ON LIABILITY FOR DEATH BY WRONGFUL ACT. — Statutes providing that personal actions shall survive the death of the party injured are frequently found side by side with statutes which allow action for wrongfully causing death. The latter class of laws — or "death acts" — are generally modelled upon Lord Campbell's Act, 9 & 10 Vict., c. 93, which provides for suit by the personal representative of the deceased for the benefit of his near relatives. Such provisions seem applicable to many cases also covered by the survival acts, and the decisions are squarely in conflict on the question of allowing recovery under both statutes for the same wrongful act. The solution of this question seems ultimately to depend on whether the death acts create an essentially new cause of action or merely apply to cases outside the scope of the survival acts and add death as a new element of damage. The cases which adopt the latter view hold that the legislature never intended to allow two actions, and evade in various ways the apparent concurrence of the remedies. Such an evasion is made in Michigan, where it has recently been held that the death acts apply only to cases where, owing to instantaneous death, no right of action ever vested in the deceased, and where, consequently, there could be no question of survival. *Dolson* v. *Lake Shore, etc., Ry. Co.*, 87 N. W. Rep. 629; *Jones* v. *McMillan*, 88 N. W. Rep. 206. To place such a restriction on the death acts, however, seems inconsistent with their broad wording and is certainly contrary to the great weight of authority. See *Com.* v. *Met. R. R. Co.*, 107 Mass. 236; TIFFANY, DEATH BY WRONGFUL ACT, § 73. Other courts make the evasion by restricting the survival acts, and hold that they apply only where the death was due to causes other than the tort sued for. *Martin* v. *M. P. Ry. Co.*, 58 Kan. 475; *Holton* v. *Daly*, 106 Ill. 131. This interpretation seems equally unwarranted by any provision of the statutes and is not generally followed. *Davis* v. *Ry.*, 53 Ark. 117; *Brown* v. *C. & N. W. Ry. Co.*, 77 N. W. Rep. 748 (Wis.).

On the other hand, the view that the death acts give a new right, thus allowing a double remedy, is supported by the weight of authority and seems preferable. *Bowes* v. *City of Boston*, 155 Mass. 344; *Needham*